

IN THE UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF MISSOURI
 WESTERN DIVISION

1	UNITED STATES OF AMERICA,)	
2)	
3	Plaintiff,)	No. 4:16-CR-00110-BCW-1
4)	March 31, 2017
5	v.)	Kansas City, Missouri
6	JAMES EVERETT,)	CRIMINAL
7	Defendant.)	

JURY TRIAL TRANSCRIPT - DAY 3
 VOLUME 3 OF 3
 BEFORE THE HONORABLE BRIAN C. WIMES
 UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic voice writing
 Transcript produced by computer

APPEARANCES

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I N D E X

<u>Description:</u>	<u>Page:</u>
Question by the Jury:	3
Instruction No. 26 read to the Jury:	10
Court declares a mistrial:	13

1 March 31, 2017

2 (Proceedings began at 9:16 AM)

3 THE COURT: Last night you all left probably around
4 6:00. I called the Jury in. I told them that we are going to
5 recess and convene back here in the morning. I read to them
6 the instruction not to talk to anybody. They left out the
7 doors here. Then probably within two minutes one juror came
8 back, two jurors came back, and then three jurors ultimately
9 ended up in the courtroom. They started to ask Ms. Baldwin
10 procedurally how they do something. I ended up saying, you
11 know, what you need to do is you all leave. Don't worry about
12 it and come back in the morning. Whatever you have, any
13 question you have, concerns, you need to write it down. When
14 everyone gets here you need to write it down and we will
15 address it in the morning. So here we are. They all got here
16 they immediately had a jury question for the Court and here we
17 are.

18 So question we are not going to be able to reach a
19 unanimous decision. Signed at 9:00 a.m. by the foreperson Ms.
20 Thompson, Juror No. 2. I'm open to thoughts and suggestions.
21 Mr. McCarther?

22 MR. MCCARTHER: Is there any indication whether it
23 is to both counts, one count?

24 THE COURT: No indication.

25 MR. MCCARTHER: All right. I guess my only

1 suggestion is to give what is known as the hammer instruction.
2 And if they come back and say it's not going to happen then --
3 I don't know.

4 THE COURT: Mr. Ermine?

5 MR. ERMINE: I agree with that solution. I think it
6 is just a question of timing.

7 THE COURT: And I agree. I agree to the timing
8 issue. But as a practical matter I'm open to any suggestions
9 on what we do in the interim. I mean, this seems to me this
10 may be the timing now, but I'm open to listen to any other
11 thoughts or suggestions that you all have.

12 MR. ERMINE: My only suggestion would be at this
13 point to give a modified version of the Allen Charge. Maybe
14 it doesn't go quite so far. I mean, you guys are sworn to do
15 your job, to deliberate, and your verdict. Kind of a nice
16 version of the Allen Charge perhaps. And if we need to pull
17 out the actual hammer later.

18 THE COURT: So you are suggesting that the Court
19 verbally or are you suggesting that we modify the hammer?

20 MR. ERMINE: I would suggest verbally bring the Jury
21 in. And maybe it's appropriate for the Allen charge. We all
22 agree that keeping the Jury passed today is not a fruitful
23 endeavor. I think we all agree maybe 3:00 would be a
24 reasonable time. And we had talked about giving perhaps the
25 actual Allen charge around noon. That's why I'm suggesting

1 giving a pared down, softer version of the charge this
2 morning. Sending them back to deliberate for a few hours
3 through lunch, give the Allen charge and after that give them
4 the hammer.

5 THE COURT: Well, and I'll let you respond, Mr.
6 McCarther, but notwithstanding even if you have to give the
7 Allen to call them out to address the question is this not
8 reaching a unanimous verdict, is this related to both counts,
9 and just talk to them about that.

10 MR. MCCARTHER: I think I mostly agree with what Mr.
11 Ermine said. But I think if we can get some clarity on
12 whether it is to both counts, whether it is to Count One, to
13 Count Two, I think that might -- that certainly might
14 influence what times we are going to talk about. I mean, if
15 they are sitting in there right now and they are not
16 deliberating because they concluded that they can't come to an
17 agreement then we might as well give the Allen charge at this
18 time.

19 THE COURT: I think they are just waiting on my
20 response right now I would suspect.

21 MR. MCCARTHER: Right.

22 THE COURT: So they probably aren't. I would
23 imagine they are not. I think they are waiting to hear from
24 me.

25 MR. MCCARTHER: Right. And to the extent that the

1 Court gives the hammer charge, I just -- hopefully the Jury
2 knows that they don't have to reach a unanimous verdict on
3 both counts. You know what I mean? If they have reached a
4 unanimous verdict to one count but not the other, then there
5 is still a verdict in play.

6 MR. ERMINE: I think it might be good for us to
7 know. Maybe they don't know that it doesn't have to be both
8 counts.

9 THE COURT: Yeah, although there is an instruction
10 that tells you.

11 MR. ERMINE: Right.

12 THE COURT: Well, I'm going to call them out and I'm
13 going to get some clarification from them. Is this an impasse
14 on both counts, one and two? And secondly, let me look at the
15 Allen charge because I want to be very careful in my words as
16 I talk to them and see if I can take some wording out of that.
17 And then I'll let you know what I have to say. Let me look at
18 the Allen charge. I want to be very clear. I agree with you
19 Mr. Ermine with maybe a softer version if you will I can get
20 there. If not I may decide. I don't know. I think that is
21 the Court to take. So give me about five to ten minutes.

22 o0o

23 THE COURT: I have an instruction the more kindly
24 asserted instruction I guess it is that I got from Judge
25 Smith. The other is I think the hammer. I think the one that

1 Judge Smith has is kind of what you suggest, Mr. Ermine. I
2 think it is right in that area. The one 10.02 is the full out
3 Allen instruction which is a bit harsher. But I wanted to
4 give you guys that so you can take a peek.

5 Now, the only question is do I simply read the
6 instruction that I've -- now, this by the way, just to give
7 you background. Judge Smith gives it out every time just in
8 his normal instructions. That way it doesn't have such the
9 impact later if you ever come to this situation. So the
10 question is, if I read this one to them and give this to them
11 as an instruction, then we later come back and make this
12 Instruction No. 26 or do we end it if they can't make a
13 decision. I'll let you respond.

14 MR. ERMINE: I might have the same thought that you
15 are about to say. I think if they come out and say that they
16 are hung on both, maybe we give them the Allen, go back and
17 deliberate. If they are hung on one, give the soft
18 instruction and reserve the Allen charge for later.

19 THE COURT: It wasn't, but I like that approach.
20 Mr. McCarther?

21 MR. MCCARTHER: I think I'm saying the same thing.
22 Yes, we give the lighter instruction and if they come back and
23 say they have a verdict on one and hung on the other, I say we
24 just accept their verdicts. If they are hung on both, I say
25 we give them the Allen charge. I think we said the same

1 thing.

2 THE COURT: No. Mr. Ermine said if they split and
3 hung on one and not the other, give them the soft one and sent
4 them back. If they are hung on both, give them the harsh one.

5 MR. ERMINE: Yes.

6 THE COURT: So here's what I'm going to do. They
7 both will be labeled 26. So no matter what they're going to
8 be sent back something. If, in fact, they are hung on both,
9 we give them the harsher Allen. If they are hung on one we
10 give Allen light for lack of a better word. I'll make sure I
11 give them the right one.

12 We are going to get this instruction prepared. I
13 will give you guys a copy. Depending on what they say. And
14 then we will call them back.

15 o0o

16 THE COURT: Mr. Everett, it is my expectation that
17 you handle yourself in a proper manner appropriate for court,
18 right? I don't want there to be any reason for me to make a
19 decision on whether you have to be restrained or not or if any
20 one feels that your actions are such. I understand that you
21 are trial. And I understand the level of anxiety that may
22 result. But what I don't want is in that anxiety or that
23 feeling that we're not conducting ourselves in the manner
24 which is going to require me to make some decisions about you
25 here in the courtroom. And I don't want to have to go there.

1 So I think we can conduct or we can communicate in a way, you
2 know, to get whatever point you want to get across presumably
3 with your attorney without causing a ruckus here in court.
4 Because ultimately my responsibility is to make sure we
5 maintain the dignity and respect that a court in my opinion at
6 least deserves. So fair enough?

7 MR. EVERETT: Okay.

8 THE COURT: That's all I had to say.

9 o0o

10 (Proceedings began at 9:50 AM)

11 THE COURT: Okay. We're going to call the Jury out
12 and I will speak with them.

13 (THEREUPON, the jury enters the courtroom; WHEREUPON, the
14 following proceedings were had in the presence of the jury.)

15 THE COURT: Okay. Well, good morning. The Court
16 had received an instruction or a question from the foreperson
17 indicating that the Jury was at an impasse or hung, is that
18 correct? And when I speak to the Jury, I am speaking to the
19 foreperson. Is that correct?

20 MS. THOMPSON: Yes, sir.

21 THE COURT: Okay. And I just want to be very
22 clear -- let me start off here that we all recognize that each
23 count is a separate crime. And you consider those separately.
24 And you can return a separate verdict for each count.

25 So my question to the foreperson is this. Is the

1 Jury at an impasse or hung -- and I don't need to know what.
2 On both of the counts or one of the counts?

3 MS. THOMPSON: On both, sir.

4 THE COURT: Okay. At an impasse on both of the
5 counts. Okay.

6 With that said, I have an instruction that is going
7 to be Instruction No 26 and I'm going to read this to the
8 Jury. And you will have a copy of this to take back with you
9 to the jury room.

10 (THEREUPON; Instruction No. 26 was read to the Jury
11 by the Court.)

12 THE COURT: We will be in recess.

13 (THEREUPON, a short recess was had; WHEREUPON, the following
14 proceedings were had.)

15 THE COURT: Instruction No. 23 which is the
16 possession instruction. The question for a person to be in
17 constructive possession do they have to know the object is
18 there? The definition of actual possession states they
19 knowingly have control. Can the same be said of constructive
20 possession? Signed by the foreperson.

21 The response that I anticipate on sending back but I
22 will let you guys have thoughts is it is the Jury's
23 responsibility to remember the evidence and follow the Court's
24 instruction. I mean, before we directed them to the
25 instructions. They know it's 23.

1 Anything from counsel?

2 MR. MCCARTHER: No, Your Honor.

3 THE COURT: I'll attach this. Again, they will
4 understand that they have got to do this.

5 o0o

6 THE COURT: Okay. We have our latest question. We
7 will not be able to make a decision and it is becoming
8 uncomfortable and hostile.

9 You all usually are talking and now it is crickets.

10 MR. MCCARTHER: Your Honor, I don't think
11 instructing them with another Allen charge is going to change
12 that.

13 THE COURT: Yeah, we gave the more coercive charge
14 the first time.

15 MR. ERMINE: I agree with counsel.

16 THE COURT: I thought will be to call them out,
17 declare a mistrial, thank them, and we'll go from there.

18 I will say, we call them out, I will run back, I
19 want you guys to stick around. I want to talk larger picture
20 on another time to try this thing or what folks are thinking.
21 But I'd like to hear from you. If that's the case. I don't
22 know. We can talk now, hell.

23 MR. ERMINE: My only thought would be when you are
24 going to bring them out, are you going to ask the foreperson,
25 I got this note, is this the way things stand?

1 THE COURT: Yes, I will. Thank you.

2 MR. MCCARTHER: I have nothing further.

3 THE COURT: So what are we thinking? You want to
4 retry or is this not the time, do you guys need time? I was
5 telling them, hell, I'll do it next week. I will. I'll just
6 clear it off and I'll get it down. But I understand that
7 there maybe some other things going on.

8 MR. ERMINE: I'm available next week.

9 MR. MCCARTHER: That is not going to work with my
10 schedule. I believe Mr. Ermine and I both discussed the June
11 docket which we both have available right now.

12 MR. ERMINE: And we also discussed the week after
13 next as well.

14 THE COURT: Let me tell you my perspective. I know
15 we have these criminal dockets and stuff. I pay very little
16 attention to that. I really do. I mean, my whole thing is,
17 you've got trials, you try them when you can try them. So in
18 June, I don't even know what I have in June. And I'd probably
19 be the one to try this again I would suspect. I don't know.
20 What do we have in June?

21 MS. BALDWIN: June 12th?

22 THE COURT: So it looks like I can. But if we can
23 do it earlier, we will do it earlier. What about the week
24 after next?

25 MS. BALDWIN: You are out of town.

1 THE COURT: Well, June is open. You know, next
2 week, just check on that trial. Sometimes they go away. I'd
3 rather do it sooner than later.

4 So I'll get them out and ask that this is their wish
5 for the deadlock and we will go from there.

6 (THEREUPON, the jury enters the courtroom; WHEREUPON, the
7 following proceedings were had in the presence of the jury.)

8 THE COURT: Okay. Ladies and gentlemen of the Jury,
9 I just want to double check. I brought you out here -- I
10 received the latest question and, again, I'm going to focus on
11 the foreperson, Ms. Thompson. I take this question to suggest
12 we are still at a deadlock or a hung Jury or an impasse, is
13 that correct?

14 MS. THOMPSON: Yes, sir.

15 THE COURT: And is it your belief that probably
16 based upon what you all have talked about and deliberated
17 about, that it is your belief that probably any further
18 deliberations wouldn't resolve, wouldn't come to an unanimous
19 decision?

20 MS. THOMPSON: Yes, sir.

21 THE COURT: Okay. Ladies and gentlemen of the Jury,
22 at the time the Court is going to declare a mistrial. So you
23 are no longer under that admonition of not talking about this
24 case. You'll be discharged as jurors. What we're going to do
25 I've got to talk to the attorneys briefly. We will recess. I

1 will be back -- I want to chat with you a little bit. I have
2 certificates. I'll be back there in about two minutes once we
3 adjourn. I'm going to talk to the attorneys briefly and then
4 I will be back in the jury room to talk to you all.

5 (THEREUPON, the jury exits the courtroom; WHEREUPON, the
6 following proceedings were had outside the presence of the
7 jury.)

8 THE COURT: I think we are down. I think you guys
9 need to get together and talk about dates. Okay. Thank you.
10 I'm open to other dates beyond or before that June 12th
11 date. I'll just make sure that we get that on the calendar
12 for now. Mr. McCarther?

13 MR. MCCARTHER: Just so I'm clear, it doesn't have
14 to be aligned with any criminal trial docket?

15 THE COURT: No. If I have room, let's try the case.
16 It's a quick case and we can get it done. If you call me and
17 it works for the Court, we will try the case. So you all talk
18 and get back to me.

19 (THEREUPON, the following proceedings were adjourned.)
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22
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CERTIFICATE

I certify that the foregoing is a correct transcript
from the record of the proceedings in the above-entitled
matter.

August 17, 2016

/s/ Denise C. Halasey
Denise C. Halasey, CCR, CVR-CM
United States Court Reporter